Filed 8/30/06 P. v. Pulley CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHANNON J. PULLEY, Defendant and Appellant.	A109056 (Contra Costa County Super. Ct. No. 950088-5)
In re SHANNON J. PULLEY, on Habeas Corpus.	A112586

On appeal from a January 2005 denial of a motion for restoration of sanity, defendant Shannon Pulley challenges a commitment order following his plea of not guilty by reason of insanity (Pen. Code, § 1026)[1] made more than 10 years earlier. Pulley contends the court lacked jurisdiction to commit him because it stated a doubt as to his competency to stand trial or, alternatively, because there was substantial evidence of his incompetency when the court took his plea. Accordingly, he contends, the commitment order and all subsequent orders are void and must be reversed.

In an accompanying petition for a writ of habeas corpus, Pulley repeats these assertions and also claims his constitutional due process rights were violated when the court took his plea rather than suspend all proceedings for an incompetency hearing. Defendant is not entitled to relief on direct appeal or by habeas corpus.

[1] All further statutory references are to the Penal Code.

BACKGROUND

The facts of the underlying offense are not relevant to this appeal and petition. So, we instead review the procedural history that bears upon defendant's claim that he was incompetent to stand trial. In January 1995 defendant was arrested and charged with attempted robbery and assault with a deadly weapon or by force likely to produce great bodily injury. The information alleged one prior strike conviction and one prior serious felony.

On January 25, 1995, the trial court appointed Dr. Gloria Bentinck to examine defendant and file a written report by February 15 regarding his competency to stand trial. On February 15, 1995, the court continued the matter to March 23, 1995, for arraignment after giving defense counsel a copy of Dr. Bentinck's report.

On March 23, 1995, the parties appeared before the court for a change of plea. Defendant withdrew his plea of not guilty and entered a plea of not guilty by reason of insanity. Based on the reports of Dr. Bentinck and psychiatrist Charles Noonan, who both concluded defendant was legally insane at the time of the offense, the court found defendant not guilty by reason of insanity pursuant to section 1026. Then, after consulting with the parties, the court ensured that defendant was advised of his rights. The prosecutor explained to defendant that if he pleaded guilty by reason of insanity he would be found guilty of the underlying offense; advised him of the trial rights he would forego by pleading; and explained that, as a consequence of his plea, he could be put in a state hospital for the rest of his life. Defendant said he understood his rights, that he was not coerced to change his plea and that he still wished to plead guilty by reason of insanity. The court found defendant knowingly and willingly gave up his constitutional rights, accepted the plea, and set the matter for April 21, 1995, for a mental health evaluation report.[2]

In a bizarrely Kafka-esque twist, the minute order does not reflect what occurred at the March 23, 1995 hearing. Rather than defendant's change of plea to not guilty by

[2] This account of the March 23, 1995, hearing is taken from the reporter's transcript.

reason of insanity, that minute order purports to memorialize a proceeding where defendant was found not competent to stand trial and referred for placement. The order states that defendant waived jury trial and agreed "that the Court may decide the issue of *competency under 1368 P.C.*" (italics added) based on the psychiatric reports. The minute order recites that the court found defendant incompetent, ordered criminal proceedings suspended, and referred defendant to the Contra Costa County Department of Mental Health Director (CONREP) for evaluation pursuant to section 1370, subdivision (a)(2)(A).[3]

This minute order, rather than what occurred in the March 23, 1995, hearing, determined defendant's custody. The proceedings continued on a "competency" track despite the defendant's plea under section 1026. The mental health services evaluation recommended that defendant be placed in the trial competency program at Atascadero State Hospital. At an April 21, 1995, hearing, the mistake was perpetuated when the parties submitted the matter on the evaluation. The court ordered defendant into the trial competency program and suspended the criminal proceedings pursuant to section 1368. On June 20, 1995, defendant was transferred to Napa State Hospital.

The confusion came to light at an August 1, 1995, hearing held at defense counsel's request. Counsel reported that "I received a call from Napa, and the reason that it's on is that I believe that he was committed under Penal Code section 1370 when actually it should have been under pursuant to [*sic*] 1026. And so I'm asking the Court to recall the original commitment and recommit under 1026." Counsel proceeded to explain how this happened: "On March 23rd this year, Mr. Pulley entered a plea of not guilty by reason of insanity. The Court found that he was not guilty by reason of insanity, and we submitted it on that matter on two reports that had already been completed, one by Dr.

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[3] Section 1370, subdivision (a)(2)(A) provides in part that, before ordering a defendant confined in a treatment facility or placed on outpatient status, the court shall "order the community program director or a designee to evaluate the defendant and to submit to the court within 15 judicial days of the order a written recommendation as to whether the defendant should be required to undergo outpatient treatment, or committed to a state hospital or to any other treatment facility. . . ."

Bentinck and one by Dr. Noonan . . . . [¶] Dr. Bentinck's original report had been ordered by the Court on February 15th and it was a 1368 report, but at the end of that report she said she believed from her interview that he was definitely N.G.I. [not guilty by reason of insanity] at the time of the offense. [¶] And then I got another report from Dr. Noonan who concluded that my client was N.G.I. at the time of the offense. [¶] So, we submitted the matter on those two reports, and the Court accepted them, and the N.G.I. plea was entered on March 23rd."

Counsel explained that the defendant was referred to CONREP for an evaluation as to whether his "N.G.I. time" would be "out of custody or in custody in the hospital. [¶] What happened was the referral to CONREP apparently got sent to them as a 1370 referral. And they had an intern working on that at the time who did the report, and if you have that April 11th report which came back to the Court from CONREP, she recommended placement. Competency training was a phrase that she used in that report. And since it was—it also said Atascadero State Hospital. I didn't pick up on that. [¶] So, we came back to court, and on April 21 you committed him to Atascadero, and you did say pursuant to 1370, but in my mind we'd done an N.G.I. plea, and all along I was thinking the CONREP was an N.G.I. report, so I didn't pick up on that then."

After apparently comparing the March 23, 1995, minute order and the transcript from that hearing, the court concluded that the minute order was in error. It directed the clerk to prepare an amended order reflecting that the commitment was pursuant to section 1026 rather than section 1370. The amended order was filed that same day.

Between 1996 and 2003 defendant filed a number of unsuccessful petitions to have his sanity restored pursuant to section 1026.2. On August 13, 2004, he filed his most recent petition, which the court denied after a hearing on January 18, 2005. Defendant timely appealed and subsequently filed a petition for writ of habeas corpus. On January 9, 2006, this court consolidated the writ petition with the appeal and requested opposition.

DISCUSSION

Although this appeal is taken from the January 2005 order, defendant's claim challenges his initial commitment in 1995. Because the court lacked the jurisdiction to commit him under section 1026 in the first instance, he maintains, the commitment order and all subsequent orders are void and may be challenged at any time without regard to questions of timeliness, waiver, or invited error. We disagree with defendant's claim that the commitment order exceeded the court's jurisdiction.

I. *The Statutory Scheme*

Subdivision (a) of section 1367 provides: "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Once the court has stated a doubt as to the defendant's competency, all proceedings must be suspended until the question of defendant's competence has been determined. Until that determination has been made, the court has no jurisdiction to proceed on the charges against the defendant. (§§ 1368, subd. (c), 1370, subd. (a)(1)(B); *Booth v. Superior Court* (1997) 57 Cal.App.4th 91, 100; *People v. Hale* (1988) 44 Cal.3d 531, 541.) Whether or not it declares such a doubt, the court is also required to suspend the proceedings and hold a competency hearing, sua sponte if necessary, if there is substantial evidence of incompetence. (§ 1368; *People v. Medina* (1990) 51 Cal.3d 870, 882; *People v. Howard* (1992) 1 Cal.4th 1132, 1163.) "[E]ven though section 1368[**4**] is

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4 Section 1368 provides in part as follows: "(a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order

phrased in terms of whether a doubt arises in the mind of the trial judge and is then confirmed by defense counsel . . ., once the accused has come forward with *substantial evidence* of incompetence to stand trial, due process *requires* that a full competence hearing be held as a matter of right. . . . [¶] 'Substantial evidence' has been defined as evidence that raises a reasonable doubt concerning the defendant's competence to stand trial. . . . 'If a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied.' " (*People v. Welch* (1999) 20 Cal.4th 701, 737-738; *People v. Howard, supra,* at p. 1163.)

On appeal we apply a substantial evidence standard based on the record at the time the ruling was made, not by reference to subsequently produced evidence. (*People v. Welch, supra*, 20 Cal.4th at p. 739; *People v. Laudermilk* (1967) 67 Cal.2d 272, 283, fn. 10.)

II. *Application*

Defendant asserts the trial court lacked jurisdiction to take his plea, accept his waiver of trial rights and find him not guilty by reason of insanity because it stated a doubt as to defendant's competency.

The defendant is correct that the failure to hold a competency hearing when required is jurisdictional and, hence, cannot be waived. As our Supreme Court has noted, " ' "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." ' " (*People v. Marks* (1988) 45 Cal.3d 1335, 1340.) Accordingly, defense counsel's acquiescence to defendant's plea did not waive the issue for review.

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that the question of the defendant's mental competence is to be determined in a hearing . . . . If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing."

We turn to defendant's contention that the court either found defendant incompetent, or, at a minimum, declared a doubt as to his competency. The record shows otherwise. Defendant's claim is based primarily on the minute orders for March 23 and April 21, 1995.[5] Those written orders state that the court found defendant incompetent and suspended criminal proceedings under section 1368. But, as we have discussed above in some detail, those orders were entered in error and did not reflect the court's actual rulings. Where, as here, a minute order and transcript of proceedings are irreconcilable, that part of the record entitled to greater credence prevails against contrary statements. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Comparison of the March 23 minute order and the reporter's transcript of the proceedings held that day confirm, as the court found on August 1, 1995, that it neither found defendant incompetent nor expressed a doubt as to his competency. While we do not minimize the gravity of the error, the fact remains that it was detected and corrected. We disregard these erroneous minute orders and defendant's reliance upon them is unavailing.[6]

Defendant also asserts that, even if the court did not find him incompetent, it expressed a doubt as to his competency when on January 25, 1995, it appointed Dr. Bentinck to evaluate him. He reads too much into the fact of Dr. Bentinck's appointment. In *People v. Visciotti* (1992) 2 Cal.4th 1, the defendant also claimed the court lacked jurisdiction to proceed to trial because it had ordered psychiatric evaluations of the defendant's competency but did not hold a competency hearing under section 1368. (*Visciotti, supra,* at p. 34.) The appellate court rejected the argument. It observed: "It is apparent from this record that counsel's request for appointment of experts for the dual purpose of assisting counsel in making a decision on whether to enter a plea of not guilty by reason of insanity and to render an opinion on defendant's competence *was preliminary to consideration by counsel, let alone the judge, of whether either had a*

[5] Defendant erroneously identifies these as 2005 orders in his opening brief.

[6] Although defendant also cites the psychiatric evaluations prepared in June and July 1995, our review is limited to the evidence available to the court at the time of the not guilty by reason of insanity plea. (*People v. Welch, supra,* 20 Cal.4th at p. 739; *People v. Marks* (2003) 31 Cal.4th 197, 218, fn. 3.)

doubt as to defendant's competence." (*Id.* at pp. 35-36, italics added; see also *People v. Panah* (2005) 35 Cal.4th 395, 432-433 [court declined to order competency hearing after obtaining psychiatric assessments].) Here, by the same token, there is no indication that the court's decision to order a psychiatric assessment of defendant's competency was due to the court's reasonable doubt on that question.

In his reply brief, defendant contends for the first time that the reports by Drs. Bentinck and Noonan constitute substantial evidence of incompetence and, therefore, mandated a competency hearing.[7] We disagree. "[T]he question as to what constitutes such substantial evidence in a proceeding under section 1368 'cannot be answered by a simple formula applicable to all situations.' [Citation.]" (*People v. Laudermilk, supra,* 67 Cal.2d at p. 283.) "[A] defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*People v. Ramos* (2004) 34 Cal.4th 494, 508.) Here, Dr. Bentinck described defendant as oriented, "a good historian in all areas outside of his delusional ideas," and average or somewhat above average in intelligence. He was aware of the charges against him and understood court procedures and the functions of various court personnel. Dr. Bentinck also found he was able to understand the nature and purpose of the criminal proceedings and could understand the implications of, and cooperate in, making a plea. However, she concluded defendant's delusional statements (e.g., that the victim was lying because she was chosen by Congress for the job of falsely accusing defendant to get him into jail so he could be

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[7] He has at least arguably waived this contention by failing to raise it in his opening brief. "Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence, the rule is that *points raised in the reply brief for the first time will not be considered*, unless good reason is shown for failure to present them before. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 616, p. 648; *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) However, in light of the jurisdictional nature of the alleged error, the importance of the question, and the fact that the People nonetheless discussed the state of the evidence at some length in their respondent's brief, we decline to treat the point as waived.

more carefully observed) would prevent him from testifying that he was innocent of the charge, should counsel wish him to testify at trial. For that reason alone, she found that his ability to cooperate in a rational manner with counsel in presenting a defense was "borderline."

Dr. Noonan concluded that defendant was "floridly mentally ill" and legally insane at the time of the offense, but did not directly address the issue of his competency to stand trial beyond stating that defendant understood that he was charged with attempted robbery, knew his attorney's name and that she was a deputy public defender, and felt he was innocent and had been arrested by mistake.

We find the evidence of incompetence to stand trial was less than substantial. The uncontradicted evidence was that defendant was able to understand the charges and proceedings against him and to cooperate in and understand the implications of entering a plea. While Dr. Bentinck also felt defendant's mental impairment would prevent him from testifying to his innocence, evidence that one potential (and unlikely) trial strategy was unavailable does not indicate the defendant could not otherwise participate and assist counsel in his defense. Indeed, the psychiatric evidence indicates to the contrary that defendant understood the proceedings against him, including the implications of his plea. On this record, the court was not required to suspend proceedings and hold a competency hearing.

The Habeas Petition

In his petition for habeas corpus, defendant contends the 1995 commitment and all subsequent orders, including the 2005 denial of his petitions for restoration of sanity, violated his constitutional due process rights. As on his direct appeal, he maintains the court expressed a doubt as to his competency by January 25, 1995, and that he was incompetent when he waived his right to a jury trial and entered his plea. He further asserts he did not personally enter his plea before the court tried him on it; that he was not arraigned until after the court found him not guilty by reason of insanity; and that the court lacked jurisdiction to correct the commitment order on August 1, 1995. Defendant

states these issues are appropriately raised on a writ of habeas corpus because he has no other adequate remedy at law to rectify the alleged violations of his constitutional rights.[8]

Well-settled law requires us to deny the petition as untimely. The Supreme Court has established a number of procedural rules governing the presentation of habeas petitions. "Such rules are necessary both to deter use of the writ to unjustifiably delay implementation of the law, and to avoid the need to set aside final judgments of conviction when retrial would be difficult or impossible." (*In re Clark* (1993) 5 Cal.4th 750, 764.) Among these is that a writ of habeas corpus must be brought within a reasonable time after the petitioner knows, or reasonably should have known, the factual and legal bases of the claim. (*Id.* at p. 784; *In re Harris* (1993) 5 Cal.4th 813, 828, fn. 7; *In re Robbins* (1998) 18 Cal.4th 770, 780.) Unjustified delay in bringing the petition bars consideration of the merits. (*In re Clark*, *supra*, at p. 759.)

To avoid this bar, the petitioner must demonstrate the absence of substantial delay, good cause for the delay, or that the claim falls within an exception to the untimeliness rule.[9] (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.) To show the absence of substantial delay, the petitioner "must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time. It is not sufficient simply to allege in general terms that the claim recently was discovered, to assert that second or successive postconviction counsel could not reasonably have discovered the information earlier, or to produce a declaration from present or former counsel to that general effect. A petitioner bears the burden of *establishing*, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay." (*Ibid*.)

This defendant cannot do. The pertinent facts have not changed since 1995. Defendant has been represented by counsel at least periodically over the 11 years since

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[8] He relies solely on the appellate record in support of these claims.

[9] See *In re Robbins, supra*, 18 Cal.4th at page 811. Defendant does not assert that any of those exceptions are applicable here.

then, during which time he has brought numerous applications for the restoration of his sanity. Not until now has counsel objected to the underlying commitment order, and no explanation is given for defense counsel's failure to have discovered the alleged errors earlier. Accordingly, the petition must be denied.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Parrilli, J.